

AMENDED IN ASSEMBLY APRIL 8, 2008

CALIFORNIA LEGISLATURE—2007–08 REGULAR SESSION

ASSEMBLY BILL

No. 2938

Introduced by Assembly Member De Leon

February 22, 2008

An act to add Section 5986.5 to ~~the Fish and Game~~, and to add Article 4.5 (commencing with Section 6050) to Chapter 3 of Part 1 of Division 6 of, *The Fish and Game Code*, and to amend Sections 5101 and 5103 of the *Water Code*, relating to fish, and making an appropriation therefor.

LEGISLATIVE COUNSEL'S DIGEST

AB 2938, as amended, De Leon. Fish: screening of water diversions.
~~Existing~~

(1) *Existing* law requires the Department of Fish and Game to examine certain conduits, and order the owner of a conduit to install a screen when, in the opinion of the department, it is necessary to prevent fish from passing into the conduit. Existing law also makes it unlawful for the owner of any conduit to refuse, fail, or neglect to install a screen in compliance with an order from the department or to permit the screen to be removed, except for repairs or cleaning. Existing law requires that, if the department makes an order to install a screen, it shall pay the owner of the conduit $\frac{1}{2}$ of the estimated cost of the construction or installation of the screen.

The Safe Drinking Water, Water Quality and Supply, Flood Control, River and Coastal Protection Bond Act of 2006 establishes the Safe Drinking Water, Water Quality and Supply, Flood Control, River and Coastal Protection Fund of 2006. The act authorizes the sale of \$5,388,000,000 in general obligation bonds, and directs that the money from the sale of the bonds shall be placed in the fund. The act makes

\$180,000,000 available for appropriation to the Department of Fish and Game for bay-delta and coastal fishery restoration projects.

The bill, except as specified, would require any person diverting water from the Sacramento-San Joaquin River Delta, as defined, to develop and submit to the department a prescribed fish entrainment monitoring program. The bill would require the department, no later than December 31, 2012, to review the results of these individual entrainment monitoring programs and would authorize the department to issue a remedial order, as prescribed. The bill would require the department to conduct a pilot program for the monitoring of entrainment of fish species in the delta by designing and constructing facilities for, and managing fish entrainment monitoring programs at, representative diversion sites.

This bill would appropriate an unspecified sum of those bond funds described above to the department for the purpose of paying the state's $\frac{1}{2}$ cost share for the construction and installation of screens on conduits as required by existing law specified purposes relating to the installation of fish screens on water diversions.

(2) Existing law, with certain exceptions, requires each person who diverts water after December 31, 1965, to file with the State Water Resources Control Board a prescribed statement of diversion and use.

This bill would delete an exception for diversions included in the consumptive use data for the delta lowlands published by the department in its hydrologic data bulletins. The bill would impose a monthly record requirement, commencing January 1, 2010, on any surface water diversion of any size that is within the Sacramento-San Joaquin Delta.

Vote: majority. Appropriation: yes. Fiscal committee: yes.
State-mandated local program: no.

The people of the State of California do enact as follows:

- 1 SECTION 1. The Legislature finds and declares the following:
- 2 (a) The entrainment of fish ~~in~~ by an estimated 1,800 to 2,200
- 3 unscreened water diversions in the Sacramento-San Joaquin River
- 4 Delta and its watershed has been identified as a factor in the decline
- 5 of the delta smelt and other threatened, endangered or at-risk
- 6 aquatic species.
- 7 ~~(b) The Department of Fish and Game is required to examine~~
- 8 ~~conduits, as defined in subdivision (b) of Section 5900 of the Fish~~
- 9 ~~and Game Code, and order the owner of a conduit with a maximum~~

1 flow capacity over 250 cubic feet per second of water to install a
2 screen when, in the opinion of the department, a screen is necessary
3 to prevent fish from passing into the conduit. The Department of
4 Fish and Game is required to pay one-half of the cost of installing
5 the screen.

6 ~~(e) However, due to inadequate funding, the Department of Fish
7 and Game has been unable to pay for its share of the costs for
8 screening conduits that entrain fish. As a result of the lack of
9 funding, few screens have been installed and the impacts of
10 unscreened diversions on listed or at-risk native aquatic species
11 has continued.~~

12 *(b) (1) The Fish and Game Code provides the authority for the
13 installation of fish screens. Screening requirements vary, depending
14 on the age and size of the diversion. For diversions constructed
15 or modified since 1972, Article 5 (commencing with Section 6100)
16 of Chapter 3 of Part 1 of Division 6 of the Fish and Game Code
17 applies. The diversion must be screened if, in the opinion of the
18 Department of Fish and Game, it will affect either salmon or
19 steelhead. For diversions installed before 1972, either of two other
20 articles applies, depending on the size of the diversion.*

21 *(2) For diversions over 250 cubic feet per second, Article 3
22 (commencing with Section 5980) of Chapter 3 of Part 1 of Division
23 6 of the Fish and Game Code applies, and requires the department
24 to make an evaluation of the effect of the diversion and requires
25 a fish screen. For diversions of 250 cubic feet per second or less,
26 Article 4 (commencing with Section 6020) of Chapter 3 of Part 1
27 of Division 6 of the Fish and Game Code applies, and allows the
28 Department of Fish and Game to make an evaluation and install
29 a fish screen.*

30 *(3) Diversions screened under Article 5 (commencing with
31 Section 6100) of Chapter 3 of Part 1 of Division 6 of the Fish and
32 Game Code are paid for entirely by the diverter. The costs of
33 screening older diversions are either shared equally by the diverter
34 and the Department of Fish and Game, or are paid for by the
35 Department of Fish and Game, depending on the volume diverted.*

36 ~~(d)~~
37 *(c) The voters approved the Safe Drinking Water, Water Quality
38 and Supply, Flood Control, River and Coastal Protection Bond
39 Act of 2006 (Proposition 84) which authorized the issuance of
40 bonds for, among other purposes, one hundred eighty million*

1 dollars (\$180,000,000) available to the Department of Fish and
2 Game, in consultation with the Department of Water Resources,
3 for bay-delta and coastal fishery restoration projects.

4 (e)

5 (d) The Legislature intends to ~~increase~~ *address the impacts of*
6 *unscreened diversions in the delta and to provide funding to*
7 *support screening of diversions in the Sacramento-San Joaquin*
8 *River Delta and its watershed, and finds that the Safe Drinking*
9 *Water, Water Quality and Supply, Flood Control, River and Coastal*
10 *Protection Bond Act of 2006 would be an appropriate source for*
11 *a portion of that funding.*

12 SEC. 2. Section 5986.5 is added to the Fish and Game Code,
13 to read:

14 5986.5. Of the funds made available pursuant to subdivision
15 (a) of Section 75050 of the Public Resources Code, the sum of
16 _____ million dollars (\$_____) is appropriated to the Department of
17 ~~Fish and Game for the purpose of paying the state's one-half cost~~
18 ~~share required by Section 5983 for the construction and installation~~
19 ~~of screens on conduits in the Sacramento-San Joaquin River Delta~~
20 ~~and its watershed. Fish and Game, for allocation as follows:~~

21 (a) *The sum of _____ (\$_____), to pay the state's cost share*
22 *required by Sections 5981, 5991, and 6028 for the construction*
23 *and installation of screens on conduits in the Sacramento-San*
24 *Joaquin River Delta and its watershed, and department costs*
25 *associated with implementation of the pilot program described in*
26 *Section 6059.*

27 (b) *The sum of _____ (\$_____) for grants to owners of conduits*
28 *or other diversion works who comply with an order pursuant to*
29 *Section 6056. Those grants shall only be available to owners of*
30 *conduits or other diversion works who establish to the satisfaction*
31 *of the State Water Resources Control Board their legal entitlement*
32 *to diversion. The unavailability of grant funds shall not relieve the*
33 *owner of its duty to comply with the order.*

34 SEC. 3. Article 4.5 (commencing with Section 6050) is added
35 to Chapter 3 of Part 1 of Division 6 of the Fish and Game Code,
36 to read:

1 Article 4.5. *Sacramento-San Joaquin Delta Diversions*

2
3 6050. *Any person diverting water from the Sacramento-San*
4 *Joaquin River Delta, defined in Section 12220 of the Water Code,*
5 *shall develop and submit to the department a fish entrainment*
6 *monitoring program to sample any conduit or other diversion*
7 *works owned or operated by the person for its potential to divert,*
8 *entrain, take, or otherwise harm a threatened, endangered, or*
9 *candidate species.*

10 6051. *A person may develop and implement a fish entrainment*
11 *monitoring program independently or in conjunction with other*
12 *persons or entities in a similar position with respect to the potential*
13 *to affect threatened, endangered, or candidate species.*

14 6052. *The department may prepare nonregulatory guidelines*
15 *to assist persons in developing and implementing fish entrainment*
16 *monitoring programs. The department shall cooperate with, and*
17 *provide assistance to, persons seeking to develop fish entrainment*
18 *monitoring programs.*

19 6053. *The initial fish entrainment monitoring program shall*
20 *be submitted to the department by December 31, 2009. The*
21 *department shall approve or return the fish entrainment monitoring*
22 *program with proposed revisions within 30 days of the date of*
23 *submission. If the department returns the fish entrainment*
24 *monitoring program to correct deficiencies, the person proposing*
25 *the program shall revise the program and resubmit it to the*
26 *department within 30 days. The department shall approve or reject*
27 *the fish entrainment monitoring program within 30 days of*
28 *resubmission. If the department rejects the proposed monitoring*
29 *program, it shall adopt a monitoring program for the person*
30 *submitting the rejected program.*

31 6054. *In making decisions to approve or disapprove a fish*
32 *entrainment monitoring program, the department shall consider,*
33 *among other things, the reliability of the proposed fish collection*
34 *methods, whether sampling will be of sufficient frequency to*
35 *accurately assess the impact of the diversions on fish species, and*
36 *measures to minimize interference with the diversions to which*
37 *the person is legally entitled. All fish entrainment monitoring*
38 *programs shall provide at a minimum for the monitoring of the*
39 *entrainment of all fish species listed under the federal Endangered*
40 *Species Act of 1973 (16 U.S.C. Sec. 1531 et seq.) or the California*

1 *Endangered Species Act (Chapter 1.5 (commencing with Section*
2 *2050) of Division 3). To be approved by the department, a fish*
3 *entrainment monitoring program shall grant access to the*
4 *department for the purpose of inspecting all facilities and*
5 *equipment used in the monitoring program, and for collecting fish*
6 *species recovered in the fish entrainment monitoring program.*
7 *The department may make onsite investigations as it determines*
8 *to be necessary to ensure the effective functioning of the fish*
9 *entrainment monitoring program.*

10 6055. *A monitoring program approved or adopted pursuant*
11 *to this article shall be implemented by the person diverting water*
12 *within the schedule set out in the program. The department or*
13 *person diverting water may seek to revise an approved or adopted*
14 *monitoring program.*

15 6056. *No later than December 31, 2012, the department shall*
16 *review the results of these individual entrainment monitoring*
17 *programs and may issue a remedial order to each owner to (a)*
18 *install a screen on, relocate, consolidate, or alter the structure of*
19 *conduits or other diversion works, or (b) alter, change, or limit*
20 *the operation of conduits or diversion works, including restricting*
21 *the time and quantities of diversions, for those conduits or*
22 *diversion works that the department determines divert, entrain,*
23 *impinge, take, or otherwise harm threatened, endangered, or*
24 *candidate species, or threaten to do so. The department may later*
25 *modify its remedial order based upon subsequent inspections and*
26 *analysis of the effectiveness of the remedial action that it previously*
27 *ordered.*

28 6057. *Any taking of fish as a result of diversions from the*
29 *Sacramento-San Joaquin River Delta shall not constitute a take*
30 *in violation of Section 2080, if the person carrying out the diversion*
31 *has a fish entrainment monitoring program that has been approved*
32 *by the department, is in compliance with all terms and conditions*
33 *of the fish entrainment monitoring program, and has complied*
34 *with all remedial orders issued by the department under Section*
35 *6056.*

36 6059. *The department shall exempt a person from the fish*
37 *entrainment monitoring and remediation requirements of Sections*
38 *6050 to 6057, inclusive, if that person has installed and is properly*
39 *utilizing a fish screen or fish barrier for that person's diversions*
40 *from the Sacramento-San Joaquin River Delta, and the person's*

1 *diversions are covered by a biological opinion and incidental take*
2 *statement, or a Habitat Conservation Plan and incidental take*
3 *permit, or a Natural Communities Conservation Plan, or some*
4 *other incidental take authorization that was issued under the*
5 *federal Endangered Species Act of 1973 (16 U.S.C. Sec. 1531 et*
6 *seq.) or the California Endangered Species Act (Chapter 1.5*
7 *(commencing with Section 2050) of Division 3) and that contains*
8 *fish monitoring and fish screening or fish barrier requirements*
9 *with which the person is complying.*

10 6060. *The department shall conduct its own pilot program for*
11 *the monitoring of entrainment of fish species in the Sacramento-San*
12 *Joaquin River Delta by designing and constructing facilities for,*
13 *and managing fish entrainment monitoring programs at, a*
14 *minimum of ____ representative diversion sites which may be on*
15 *either public or private land. The department shall be responsible*
16 *for the entire cost of these programs at each site. The participation*
17 *of any person diverting from the Sacramento-San Joaquin River*
18 *Delta in the department's pilot program is voluntary, and shall*
19 *be in lieu of participation in, and will satisfy the requirements of,*
20 *the fish entrainment monitoring program described in Sections*
21 *6050 to 6055, inclusive, but shall not exempt the person from any*
22 *department remedial order issued under Section 6056.*

23 6061. *The owner or operator of a diversion that participates*
24 *in the pilot program shall grant to the department, as a condition*
25 *of participation in the program, the right of access to the person's*
26 *property for the installation, operation, and maintenance of any*
27 *facilities, structures, or equipment, or for monitoring or other*
28 *activities necessary for the successful implementation of the*
29 *monitoring program. The owner or operator also shall provide*
30 *the department an easement for the installation of any facilities,*
31 *equipment, or activities necessary for the monitoring program.*
32 *The department shall retain sole authority and discretion over the*
33 *design, implementation, and maintenance of all aspects of the fish*
34 *entrainment monitoring program on the property of any person*
35 *participating in the department's pilot program.*

36 6062. *The department's pilot program shall be in effect for a*
37 *period of three years. All monitoring results obtained from the fish*
38 *entrainment monitoring program in Sections 6050 to 6055,*
39 *inclusive, and the department's pilot program, shall be public*

1 *information that the department shall make available to the general*
2 *public by appropriate means.*

3 *SEC. 4. Section 5101 of the Water Code is amended to read:*

4 5101. Each person who, after December 31, 1965, diverts water
5 shall file with the board, prior to July 1 of the succeeding year, a
6 statement of his *or her* diversion and use; provided, however, that
7 no statement need be filed if the diversion is any of the following:

8 (a) From a spring ~~which~~ *that* does not flow off the property on
9 which it is located.

10 (b) Covered by an application, permit, or license to appropriate
11 water on file with the board.

12 (c) Included in a notice filed pursuant to Part 5 (commencing
13 with Section 4999) ~~of this division.~~

14 (d) Regulated by a watermaster appointed by the department.

15 (e) Reported by the department in its hydrologic data bulletins.

16 ~~(f) Included in the consumptive use data for the delta lowlands~~
17 ~~published by the department in its hydrologic data bulletins.~~

18 ~~(g)~~

19 (f) Included in annual reports filed with a court or the board by
20 a watermaster appointed by a court or pursuant to statute to
21 administer a final judgment determining rights to water, which
22 reports identify the persons who have diverted water and give the
23 general place of use and the quantity of water which has been
24 diverted from each source.

25 ~~(h)~~

26 (g) For use in compliance with the provisions of Article 2.5
27 (commencing with Section 1226) of Chapter 1 of Part 2 of this
28 division.

29 *SEC. 5. Section 5103 of the Water Code is amended to read:*

30 5103. Each statement shall be prepared on a form provided by
31 the board. The statement shall include all of the following
32 information:

33 (a) The name and address of the person who diverted water and
34 of the person filing the statement.

35 (b) The name of the stream or other source from which water
36 was diverted, and the name of the next major stream or other body
37 of water to which the source is tributary.

38 (c) The place of diversion. If a public land survey has been
39 made, location of diversion works shall be described to the nearest

1 40-acre subdivision. If not, it shall be described by reference to
2 nearest local landmarks or other recorded surveys.

3 (d) The capacity of the diversion works and of the storage
4 reservoir, if any, and the months in which water was used during
5 the preceding calendar year.

6 (e) (1) On and after January 1, 2012, monthly records *of the*
7 *amount* of water diversions. The measurements of the diversion
8 shall be made using best available technologies and best
9 professional practices. Nothing in this paragraph shall be construed
10 to require the implementation of technologies or practices that are
11 not locally cost effective.

12 (2) ~~Paragraph~~ *Except as specified in paragraph (3), paragraph*
13 *(1) does not apply to a surface water diversion-with that is outside*
14 *the Sacramento-San Joaquin Delta as defined in Section 12220,*
15 *and that has a combined diversion capacity from a natural channel*
16 *that is less than 50 cubic feet per second or to diverters using*
17 *siphons in the tidal zone.*

18 (3) *Commencing January 1, 2010, the monthly record*
19 *requirement of paragraph (1) shall apply to any surface water*
20 *diversion of any size that is within the Sacramento-San Joaquin*
21 *Delta, as defined in Section 12220.*

22 ~~(3)~~

23 (4) (A) The terms of, and eligibility for, any grant or loan
24 awarded or administered by the department, the board, or the
25 California Bay-Delta Authority on behalf of a person that is subject
26 to paragraph (1) shall be conditioned on compliance with that
27 paragraph.

28 (B) Notwithstanding subparagraph (A), the board may determine
29 that a person is eligible for a grant or loan even though the person
30 is not complying with paragraph (1), if both of the following apply:

31 (i) The board determines that the grant or loan will assist the
32 grantee or loan recipient in complying with paragraph (1).

33 (ii) The person has submitted to the board a one-year schedule
34 for complying with paragraph (1).

35 (C) It is the intent of the Legislature that the requirements of
36 this subdivision shall complement and not affect the scope of
37 authority granted to the board by provisions of law other than this
38 article.

39 (f) For persons not subject to paragraph (1) of subdivision (e),
40 a description of the acreage of each crop irrigated, the average

- 1 number of people served with water, the average number of stock
2 watered, and the nature and extent of any other use during the
3 preceding calendar year, or other equivalent information that
4 indicates the quantity of water used as may be prescribed by the
5 board. Those who maintain water measuring devices and keep
6 monthly records of water diversions shall state the quantity of
7 water diverted by months during the preceding calendar year.
- 8 (g) The purpose of use.
- 9 (h) A general description of the area in which the water was
10 used. If the water was used on an area within the $\frac{1}{16}$ section
11 containing the point of diversion, a statement to that effect will
12 suffice; otherwise a description or sketch of the general area of
13 use shall be given.
- 14 (i) The year in which the diversion was commenced as near as
15 is known.